

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NEUBER ENVIRONMENTAL SERVICES, INC.,	:	CIVIL ACTION
	:	
	:	
Plaintiff	:	
	:	
v.	:	
	:	
WARNER JENKINSON COMPANY, INC. and SENSIENT TECHNOLOGIES :	:	
CORPORATION d/b/a SENSIENT	:	
TECHNICAL COLORS,	:	NO. 05-3074
	:	
Defendants	:	

MEMORANDUM & ORDER

Stengel, J.

Date: August 11, 2005

Neuber Environmental Services, Inc. (NESI), an environmental contractor, entered a contract with Crompton & Knowles, Sensient Colors'¹ predecessor, to rejuvenate a residual waste disposal lagoon/impoundment in Birdsboro, Pennsylvania. The project involved removing waste from the property, adding reagent to solidify the waste, and placing the material into another impoundment at the site. Crompton & Knowles retained Advanced Geoservices Corporation ("AGC") to act as the engineer for the project. AGC drafted the contract documents, managed the bidding process, and oversaw the progress of the project. In April 2001, Crompton & Knowles awarded the contract to NESI. Sensient Colors took over ownership of the facility from Crompton & Knowles in November 2001.

The essence of NESI's complaint is that Defendants failed to notify NESI about the

¹ According to defendants, Warner Jenkinson changed its name to Sensient Colors, Inc. and Sensient Technologies Corporation is the parent of Sensient Colors, Inc.

material conditions at the lagoon and NESI was thereby forced to expend extra money and time to complete the work. NESI filed this suit for breach of contract, unjust enrichment, breach of Contractor/Subcontractor Payment Act, conversion, and negligent misrepresentation. Defendants filed this motion to dismiss, or in the alternative, to stay the judicial proceedings, arguing that NESI's claims are subject to an arbitration provision. Because the contract at issue in this case contains valid dispute resolution provisions and that Plaintiff's claims fall within the scope of these provisions, the parties are obligated to comply with dispute resolution provisions set forth in the contract. I will therefore stay the judicial proceedings in this case.

I. Standard for a Motion to Dismiss

The court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding a motion to dismiss, the court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id.; see also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984). In addition to those allegations included in the complaint, the court "may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Pension Benefit Guarantee Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

Defendants request that, in the alternative, the court stay all judicial proceedings. Both the Federal Arbitration Act, 9 U.S.C. § 3, and Pennsylvania state law, 42 Pa. Cons. Stat. Ann. §

7304(d), require a stay of judicial proceedings when a case is referred to arbitration.² See Lloyd v. Hovensa, 369 F.3d 263, 269-271 (3d Cir. 2004); Maleski v. Mutual Fire, Marine & Inland Ins. Co., 534 Pa. 575, 580 (Pa. 1993); see also Schantz v. Gary Barbera Dodgeland, 830 A.2d 1265, 1266 (Pa. Super. 2003). I find that this is the appropriate course regardless of which body of law is applied.

II. Discussion

To find that dispute is subject to arbitration, the court must determine that a valid arbitration agreement exists and that the dispute is within the scope of that agreement. See Callan v. Oxford Land Development, 858 A.2d 1229, 1233 (Pa. Super. Ct. 2004) (explaining the standard under Pennsylvania law); see also PaineWebber v. Hartman, 921 F.2d 507, 510-511 (3d Cir. 1990) (describing standard under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*).³ Any doubts regarding whether a dispute is covered by the arbitration provision are to be resolved in favor of arbitration. See Hussey Metal Div. of Copper Range Co. v. Lectromelt Furnace Div. McGraw-Edison Co., 471 F.2d 556 (3d Cir. 1972). In this case, I find that the contract between the parties contains broad dispute resolution provisions and that the claims asserted by the Plaintiff are within the scope of those provisions.

In its Complaint, NESI states:

All bid documents, designs and disclosures respecting the project
were drafted for Sensient by Advanced GeoServices Corp.

² Defendants contend that section 5.1 of the Contract Documents requires this court to apply Pennsylvania law in interpreting the Contract Documents. Because the standard under Pennsylvania law is the same as that under the FAA, I need not decide which law governs the contract between the parties. See Frederick v. Davitt, 2003 U.S. Dist. LEXIS 1381, at *5, n.1.

³ See supra note 2.

(“AGC”). Because of the bulk of the entire bid document package and contract is not attached [sic]; relevant portions of the contract are attached hereto as Exhibit “A.” A full and complete copy of the bid and Contract documents are in the possession of Sensient.

Pl.’s Compl. ¶4. Exhibit A is a copy of a signed purchase order which includes a description of services, price, and a section entitled “Terms and Conditions of Purchase.”⁴ Pl.’s Compl., Ex. A. Plaintiff contends that the purchase order constitutes the entire agreement between the parties, and because this document does not contain an arbitration provision, the parties are under no obligation to arbitrate their dispute. The “Description” section in the purchase order, however, incorporates by reference a non-contemporaneous document entitled “Contract Documents for Impoundment #4A Rejuvenation,” which is dated March 1, 2001.⁵ Id. Defendants attached

⁴ The “Terms and Conditions of Purchase” are listed on the back of the purchase order. The first paragraph provides:

By accepting or filing this order or render [sic] services under this order Seller or Contractor agrees to its terms and conditions, which shall prevail over any inconsistent provisions in any form or other paper submitted by Seller or Contractor. This order shall constitute the entire agreement between the parties unless modified in writing by both parties.

Pl.’s Compl. Ex. A, at 2, ¶1. The dispute resolution provisions do not contradict any express provision in the “Terms or Conditions of Purchase.”

⁵ Specifically, the “Description” section states: “Provide services in accordance with contract documents for impoundment #4A Rejuvenation dated March 1, 2001, Neuber bid dated April 11, 2001, and revised bid form included with Neuber letter dated March 7, 2002.” As the court in Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp., 324 F. Supp. 2d 731, 749 (W.D. Pa. 2004), noted:

Generally, all writings which are part of the same transaction are interpreted together. One application of this principle is the situation where the parties have expressed their intention to have one document’s provision read into a separate document. So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, non-contemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned. It is not necessary to refer to or incorporate the entire document; if the parties so desire, they may incorporate a portion of the document. But incorporation by reference is ineffective to accomplish its intended purpose where the provision to which

several relevant pages of the Contract Documents to their motion to dismiss. Plaintiff does not dispute the authenticity of these documents. The Contract Documents require the parties to engage in a two-step dispute resolution process.⁶ The language in section 39.1 requires that “[a]ll claims, disputes and other matters in question between Owner and Contractor arising out of, or relating to the Contract Documents or the breach thereof will be decided by arbitration in accordance with Pennsylvania Law, subject to the limitations of this Section 39.0.” This language is sufficiently broad to capture all the claims Plaintiff has asserted in this action. Plaintiff does not argue otherwise.

reference is made do not have a reasonably clear and ascertainable meaning.

(quoting 11 Williston on Contracts § 30:25 (Richard A. Lord ed., 4th ed. 2003)). In this case, I find that the meaning is reasonably clear and ascertainable, and the parties effectively incorporated the Contract Documents by reference.

⁶ Three provisions of the Contract Documents are particularly relevant. Section 4.8 of the Contract Documents provides that:

Engineer will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work or the interpretation of the requirements of the Contract Documents pertaining to the performance and furnishing of the Work and claims [sic] respect of changes in the Contract Price of [sic] Contract Time will be referred initially in writing with a request for a formal decision which Engineer will render in writing within a reasonable time.

Section 39.2 explains:

No demand for arbitration of any claim, dispute, or other matter that is required to be referred to Engineer for decision in accordance with Paragraph 4.8 will be made until (a) the date on which Engineer has rendered a decision, or (b) the tenth day after the parties have presented their evidence to Engineer if a written decision has not be rendered by Engineer before that date....

Section 39.1 contains a general provision which requires that “[a]ll claims disputes and other matters in question between Owner and Contractor arising out of, or relating to the Contract Documents or the breach thereof will be decided by arbitration in accordance with Pennsylvania Law, subject to the limitations of this Section 39.0.”

III. Conclusion

Because I find that each of Plaintiff's claims is subject to the arbitration provision set forth in the Contract Documents, I will direct the parties to comply with the dispute resolution provisions set forth therein. All judicial proceedings in this court shall be stayed until such dispute resolution processes are completed.

An appropriate order follows.

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CORPORATION d/b/a SENSIENT	:	
TECHNICAL COLORS,	:	NO. 05-3074
	:	
Defendants	:	

ORDER

AND NOW, this 11th day of August, 2005, upon consideration of Defendants' Motion to Dismiss and Plaintiff's Response thereto, it is hereby **ORDERED** that the parties shall comply with the dispute resolution processes as outlined in the Contract Documents for Impoundment #4A Rejuvenation, incorporated by reference in the Purchase Order attached as Exhibit A to Plaintiff's Complaint. All judicial proceedings in this court shall be **STAYED** until completion of those processes.

BY THE COURT:

LAWRENCE F. STENGEL, J.